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IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1914

THE STATE OF GEORGIA,
*Complainant,*

vs.

THE TENNESSEE COPPER COMPANY
and
THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY, Limited,
*Defendants.*

No. 1, ORIGINAL

## Petition and Brief of the State of Tennessee

FRANK M. THOMPSON,
*Attorney-General of Tennessee.*

JOE V. WILLIAMS,
*Of Counsel.*

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# Supreme Court of the United States

OCTOBER TERM, 1915.

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THE STATE OF GEORGIA,
*Plaintiff,*

*vs.*

TENNESSEE COPPER COMPANY AND DUCKTOWN SULPHUR, COPPER & IRON CO., Limited,
*Defendants.*

No. 1, ORIGINAL

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*MOTION AND PETITION OF STATE OF TENNESSEE FOR LEAVE TO INTERVENE.*

*MOTION.*

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The State of Tennessee moves that it be granted leave to intervene and to file the Petition hereto attached, to the end that it may ask a modification of the orders heretofore passed with respect to the output of Ducktown Sulphur, Copper & Iron Company, comformably to the report and recommendations of Dr. John T. McGill, filed January 1, 1916.

## *PETITION.*

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petition of the State of Tennessee, one of the United States of America, by Tom C. Rye, as Governor, and Frank M. Thompson, as Attorney-General, who come on behalf of certain citizens and taxpayers of Polk County, Tennessee, and ask leave of the Court to here intervene for the purposes hereinafter shown.

Your petitioner, the State of Tennessee, has been petitioned by some seven hundred citizens and taxpayers, who reside in Polk County, one of the Counties in said state, to intervene in this cause. This request is made in the form of petitions signed by such citizens and taxpayers, which petitions have been tendered to the Clerk of this Court to be filed, and one of which, with the signatures appended to all petitions, is set forth in the appendix to this petition.

As will be seen from the petitions signed by said citizens and taxpayers, it is represented, in brief, that this Honorable Court had heretofore appointed Dr. John T. McGill, of Vanderbilt University, of Nashville, Tennessee, to inspect the premises of the defendant, The Ducktown Sulphur, Copper & Iron Company, and to report his observations and to make such recommendations for the future action of the company as the facts justified; that Dr. McGill had made an inspection of the operations and plant of the company, pursuant to decree of this Court, and had filed his report and recommendations to the effect that the

limitations previously imposed by the Court as to the output of said company was unnecessary; and that nothwithstanding such report, this Honorable Court had made an order restricting the emission of gases by said company to about two-thirds of the output which the inspector had recommended and that the cause had been retained in Court for further orders.

Moved by the fact that such a large body of the taxpayers and citizens of one of its counties had thus petitioned the State of Tennessee to become a party herein, the Governor of said State requested that the Attorney-General make an investigation of the facts in the case, and, if he thought proper, the State of Tennessee should become a party to this litigation. The Chief Executive of the State was also no doubt moved to this course by the ruling of the Supreme Court of Tennessee, in the case of *Madison vs. Copper Company*, 113 Tenn. 331, where said Court held that this company and its co-defendant, the Tennessee Copper Company, were large taxpayers and the employers of several hundreds of Tennessee's citizens and citizens of Georgia also; and that it was important to the State that said companies be permitted to operate their plants within reasonable bounds.

*MEMORANDUM BRIEF SUPPORTING PETITION.*

The representatives of the State of Tennessee have studied the report filed in this case on January 1, 1916, by Inspector Dr. John T. McGill, and have made such investigation of this litigation from the beginning as the time and conditions would permit since the petitions aforesaid were presented asking that the State of Tennessee

become a party herein. And they beg to suggest to this Honorable Court that, in their opinion, a fair interpretation of the report of the Inspector shows that he meant to report and recommend that the defendant, The Ducktown Sulphur, Copper & Iron Company, Limited, should be permitted to allow a daily escape of gases carrying forty tons of sulphur content from May 1st to October 1st of each year; and correspondingly during the remaining period eighty tons of sulphur per day. And that by the term "sulphur content," *he did not mean "sulphur dioxide," but sulphur proper.*

On page 59 of the Inspector's report he gives as his "opinion that the restriction of the Company's operations during a whole season to an output *far below its capacity is unnecessary,*" and on page 60 of the report, he recommends:

> "That, in ordinary conditions of the atmosphere, a total sulphur content of the gases escaping of not exceeding forty tons per day for two consecutive days during the period from May 1st to October 1st of each year be permitted, and not exceeding eighty tons per day for two consecutive days during the remaining months of the year."

The draftsman of this petition has not had an opportunity to read all the testimony in this case, but he is advised and understands that until this report of the Inspector was made, the sulphur content of gases liberated by this company beginning about June 1, 1915, was not permitted to exceed twenty tons per day during the summer months named, and forty tons per day during the balance of the year. We are also advised that the company

had been required to measure the output daily. Manifestly, the Inspector intended to recommend an increase of nearly double the previously restricted output, and an average two-day measurement instead of a daily measurement as theretofore, as is shown in the report on pages 63-64.

This latter recommendation seems altogether reasonable, for, as pointed out by the Inspector, the ores vary widely in composition from day to day, since they come from different mines occupying different locations, and the sulphur content in any given amount of ore would likewise vary. And, as the Inspector points out, one cannot compute the daily output from the furnace until the day's work is done and all assays of the resulting furnace products have been made and calculations worked out. (See pages 17, 19, 63-64 of Inspector's report.)

We beg to submit that the report of Dr. McGill was not excepted to. It stands unchallenged. And it is very earnestly submitted that as the recommendations of the Inspector are not excepted to, and are well supported by the facts, they should be accepted and followed. No one has challenged either the facts he relates or the recommendations made.

Or, may we suggest that if any doubt exists as to the correctness of either the facts reported by the Inspector or his recommendations, that another Inspector be now named to make a further report, in event the Ducktown Company does not object? We understand it has already borne considerable expense herein, paying $5,000.00 at one time; and that it has recently been charged with heavy

costs. Hence, it may be that a further inspection, as proposed, would be objectionable to it — especially as it appears that in August, 1913, Georgia offered it passivity for $8,500.00 per annum.

For argument, assume a State may be justified in thus contracting, and that defendant erred, from the viewpoint of economy, when it failed to thus purchase quiescence, still, the Company has expended vast sums in good faith to meet the suggestions of the Honorable Court in the opinion of May, 1907. (206 U. S., 239.) And the Inspector now reports that with perfect safety to Georgia territory, the previous emission of 20 tons daily sulphur content may be practically doubled. The Inspector evidently employed the term "sulphur content" in his recommendations (p. 60) in the same sense the Court did in its order of June 1, 1915.

On page 14 of his report, he pointed out that "sulphur is half by weight of sulphur dioxide," and on page 7 he mentioned "the sulphur content of escaping gases."

He demonstrated on page 58, that by actual test a mixture containing 6 parts of sulphur dioxide to one million parts of air, did little damage 1,200 yards from the Company's smelter. And, on page 55, he shows that under normal conditions, with an emission of 20 tons of sulphur (40 tons sulphur dioxide) daily, no more than one part of sulphur to one million parts of air existed one mile from the smelter.

It will be remembered that this Company's smelter is over three miles from the Georgia line. (See report, p.

31.) And it is very significant that the parties agreed, during Dr. McGill's observations, for an emission of gases carrying 40 tons of sulphur content daily during a continuous period of ten days (just as Dr. McGill now proposes) and no harmful results were visible. (See page 64 of report.) And when the output of the Company was thus doubled for ten days continuously, only twice was the "full capacity of 160 tons per day" of the acid plant realized. (Report, p. 18.)

Another thought is that there are "two smelters in this region" (Report, p. 36), and that the Tennessee Company is continuously operating on a much larger scale than the Ducktown Company. Thus it is obvious, as the smelter of the Tennessee Company is within a half mile of the Georgia line, that its operations would certainly produce much more harmful results than those of the Ducktown Company. Yet the Tennessee Company is not now complained of.

Very true, in the original opinion herein, it was said:

> "If the State has a case at all, it is somewhat more certainly entitled to specific relief than a private party might be. It is not lightly to be required to give up *quasi* sovereign rights for pay; and, apart from the difficulty of valuing such rights in money, if that be its choice, it may insist that an infraction of them shall be stopped." (206 U. S., 237.)

But it will now be remembered that Georgia, in 1913, placed a value of $8,500.00 per annum upon her quiescence. And that in October, 1907, her learned Attorney-General invited this Company to expend vast sums of money —

which it did. And, shortly before, the Supreme Court of Tennessee, in *Madison vs. Copper Company, supra,* had likewise encouraged such expenditures.

The Company, to an extent at least, has therefore become a ward of Tennessee, and as such it is believed she is obligated to now ask permission to intervene for the protection, not only of the ward, but thousands of other citizens. And the important fact should not be overlooked that many thousands of Georgia citizens are equally dependent, with those of Tennessee, on the defendant Companies herein.

Responding to the petition of its citizens hereto appended, Tennessee asks to interpose whatever sovereign right she may have, and asks all consistent relief for an enterprise of such vast importance to her material growth and prosperity. And that the Company be permitted to utilize the largest amount of ores possible, without doing harm to the citizens of Georgia.

The State of Tennessee therefore respectfully, but earnestly, urges a modification of the restriction heretofore imposed, conformably to the Inspector's report.

At the invitation of Georgia, in October, 1907, this Company spent over $700,000.00, and completed its acid plant in 1909. No complaint seems to have been made and no notice taken of this Company for more than four years thereafter — and until it refused to pay a yearly indemnity of $8,500.00.

In this view, we submit Georgia is equitably estopped to now insist that the Company's acid plant, which it built

on Georgia's invitation, should be partially paralyzed and its output reduced far below its capacity.

In conclusion, we cannot better express the importance of this enterprise and its co-defendant, the Tennessee Copper Company, and cannot more forcibly illustrate the equities of the Company than to quote from *Madison vs. Copper Company*, 113 Tennessee, 331, where, on application for an injunction, the Tennessee Supreme Court found the following facts, and upon such finding, it said:

> "That the total tax aggregate of Polk County for the year 1903 was $2,585,913.43, of which total the assessments of the defendants amounted to $1,279,533. It is also found that prior to the operations of these companies there lived in the district where these works are located only two hundred people, whereas, there are now living in this district, almost wholly dependent upon these copper industries, about 12,000 people.
>
> "It is also found that one of the defendants, the Tennessee Copper Company, employs upon its payroll 1,300 men, and that the average payroll is about $40,000 per month, nearly all of which employees have been drawn from the population of Polk and neighboring counties.
>
> "It is further found that one of the defendants, the Tennesse Copper Company, consumes approximately 3,000 tons of coke, 2,800 tons of coal, and 1,000 cords of wood per month, and that it purchases and uses 2,110 carloads of coal, coke, wood, etc., per annum. In the year 1901 it purchased and used approximately 1,100 carloads of cord wood, cross-ties, lumber and quartz. It was also found that 80 per cent. of these sup-

plies were purchased from, and delivered by, the citizens of Polk County. The aggregate paid out for supplies is not stated in the findings of the Court of Chancery appeals, and cannot be here stated accurately, but certainly the amount is very large; and it seems from the figures stated that one of the defendants alone, the Tennessee Copper Company, pays out annually in wages in Polk County nearly a half million of dollars. The Court of Chancery appeals finds that the other company employs between 1,100 and 1,200 people, and from this it may be inferred that the company pays out in wages and for suplies annually nearly as much as the Tennessee Copper Company.

"It is quite apparent that the two companies pay out annually vast sums of money, which are necessarily of great benefit to the people of the county, and that they are conducting and maintaining an industry upon which a laboring population of from ten to twelve thousand people are practically dependent; and it is found, in substance, by the Court of Chancery appeals, that, if these industries be suppressed, these thousands of people will have to wander forth to other localities to find shelter and work. (113 Tenn. 343 to 345.)

* * * * * *

"The question now to be considered is, what is the proper exercise of discretion, under the facts appearing in the case? Shall the complainants be granted, in the way of damages, the full measure of relief to which their injuries entitle them, or shall we go further, and grant their request to blot out two great mining and manufacturing enterprises, destroy half the taxable values of a county, and drive more than 10,000 people from their homes? We think there can

be no doubt as to what the true answer to this question should be.

"In order to protect by injunction several small tracts of land, aggregating in value less than $1,000, we are asked to destroy other property worth nearly $2,000,000, and wreck two great mining and manufacturing enterprises, that are engaged in work of very great importance, not only to their owners, but to the State, and to the whole country as well, to depopulate a large town, and deprive thousands of working people of their homes and livelihood, and scatter them broadcast. The result would be practically a confiscation of the property of the defendants for the benefit of the complainants — and appropriation without compensation. The defendants cannot reduce their ores in a manner different from that they are now employing, and there is no more remote place to which they can remove. The decree asked for would deprive them of all their rights. We appreciate the argument based on the fact that the homes of the complainants who live on the small tracts of land referred to are not so comfortable and useful to their owners as they were before they were affected by the smoke complained of, and we are deeply sensible of the truth of the proposition that no man is entitled to any more rights than another on the ground that he has or owns more property than that other. But in a case of conflicting rights, where neither party can enjoy his own without in some measure restricting the liberty of the other in the use of property, the law must make the best arrangement it can between the contending parties, with a view to preserving to each one the largest measure of liberty possible under the circumstances. We see no escape from the conclusion in the present case that the only proper decree is to allow the complainants a reference for the

ascertainment of damages, and that the injunction must be denied to them, except in the qualified manner below indicated." (113 Tenn. 368.)

Wherefore, the State of Tennesse petitions to become a party to this suit, to the end that it may ask, on behalf of Ducktown Sulphur, Copper & Iron Co., Limited, a modification of the decrees heretofore entered, comformably to the recommendations of Dr. John T. McGill.

Respectfully submitted,

FRANK M. THOMPSON,
Attorney-General of Tennessee.

JOE V. WILLIAMS,
Of Counsel.

On this May 30, 1916, the State of Georgia hereby acknowledges receipt of a copy of the foregoing Motion and Petition.

CLIFFORD WALKER,
Attorney-General of Georgia.

## APPENDIX.

*To His Excellency,*
*Honorable Thomas C. Rye,*
*Governor of Tennessee:*

We, citizens of Polk County, beg to inform you that in 1891, The Ducktown Sulphur, Copper & Iron Company, Limited, at heavy cost, began developing previously barren and unproductive territory in this County, at Isabella, some three miles north of the Georgia line, by mining and smelting very low grade copper ores.

The Company has operated continuously since in substantially the same manner — save as related below. In June, 1903, it changed from open heap roasting of the ores to pyritic smelting. In 1901 Tennessee Copper Company also began smelting about one-fourth of a mile north of the Georgia line. In 1904 it also changed to pyritic smelting. Complaints of damage were registered from both Tennesse and Georgia citizens prior to and during 1904, when Georgia applied to United States Supreme Court for injunctive relief *against both Companies,* but this was subsequently withdrawn.

Petitioners understand no effort was or has ever been made to ascertain or apportion responsibility as between the two Companies, and in 1906 Georgia renewed her application to said Court, and the Court, in 1907, held that *Georgia "might more certainly be entitled to injunctive relief" than an individual would be;* and that it was then entitled to an injunction against both Companies, but suggested a reasonable time be allowed them to complete and test certain structures then under way or proposed, in-

cluding an acid plant which the Ducktown Company has since constructed and put into practical operation at an expense of over $600,000.00.

The case was thereafter continued for some years by Georgia, without entering any decree, under some contractual arrangement between Georgia and Tennessee Copper Company, no attention apparently being paid to the Ducktown Company.

In August, 1913, the Georgia Legislature proposed for the Tennessee Company to pay not exceeding $16,500.00 per annum for three years, and in consideration it might continue operations substantially as before.

The same Legislature, for the first time in several years, took notice of the Ducktown Company and resolved that it might enjoy the same immunity extended to the Tennessee Company on paying $8,500.00 per annum, to be deposited and distributed among North Georgia citizens on certain conditions. It also resolved that in default of the Ducktown Company's so doing, the old injunction tentatively granted in 1907 should be applied for.

The Ducktown Company refused to pay the price of immunity, and the Attorney-General of Georgia accordingly asked an injunction, which was resisted by the Company. The Court, in April, 1914, continued the application of Georgia to the next term, and permitted testimony taken in the meantime to show changed conditions, if any, since 1907.

In June, 1915, the Court directed the Company should not permit an escape of gases into the air, the total sulphur

of which exceeded twenty (20) tons from April 1st to October 1st of each year, or forty (40) tons in one day during any other season; and ordered Dr. John T. McGill, of Vanderbilt University, to periodically inspect the premises of the Ducktown Company and study the conditions for six months, and report his observations, accompanied by recommendations as to appropriate future action.

This was done, and Dr. McGill has filed his report and recommendations to the effect that the limitations previously imposed by the Court was unnecessary — and proposing that the escape of gases into the air might be *doubled* without harm to Georgia territory.

Notwithstanding this recommendation, however, on application of Georgia, the Honorable Supreme Court restricted the emission of gases by the Ducktown Company to 62½ per cent., as compared with said report, and retained the case for further order of the Court.

Petitioners now show that the Ducktown Company is a principal taxpayer of Polk County. It employs hundreds of citizens residing in said County and North Georgia. It pays hundreds of thousands of dollars annually for labor and supplies. They are advised the restrictions imposed by the Honorable Supreme Court embarrass the Company and will necessitate a substantial decrease in expenditures and in revenues, to the very great detriment of Polk County and her citizens.

Insomuch as it appears that a State may have some additional measure of relief, as compared with an individual, petitioners respectfully urge your Excellency, in the name

and for the benefit of Tennessee and Polk County, a civil division thereof, recommend or direct the Attorney-General to intervene in said pending cause in the interest of the Ducktown Company; and that he ask, in the name of the State, all consistent relief for the benefit of said Ducktown Company, as a taxpayer and large employer of labor in Polk County.

This May 10, 1915.

SIGNED.

W. L. Dalton,
(Marshal Copperhill)
J. N. Cole
W. H. Chancey
W. M. McLinn Black
Smith Fain
M. N. Collins (carpenter)
Tim Ivans
S. J. Jones
F. C. Henson
L. L. Akins (merchant)
D. K. Adams
J. E. Adams
M. W. Gass
H. C. Nippett
R. L. Hutchins
F. N. O'Anenby
A. W. Lewis
John P. McGee
G. N. Black
F. A. Quinn
W. T. Center (merchant)
H. E. Hicks
McKinney Stone Co.
O. W. Duggan
C. H. Dalton
A. L. Dalton
J. E. DeArmond
M. C. Fain (merchant)
John Fain
J. V. Hollifield
S. H. Payne (merchant)
D. C. McCoy
J. A. Montgomery
W. H. Phillips (barber)
Franklin Mercantile Co.
Jeff A. Hedden
J. B. Panter
J. P. Mill & Co.
Ed C. Mulligan
W. G. Parks
J. W. Hamby
Lee McBee
John L. Laudermilk
C. W. Harris
W. A. Revis
A. J. Wilson
H. B. Bell
L. M. Catlett
J. R. Campbell

H. C. Calunet
W. G. McAfee
A. C. Cook
L. A. Gratz
R. L. McLean
J. J. Barnes
O. H. Pulliam
J. L. Reynolds
Abernathy & McMillan
C. O. Beaver
M. M. Matlock
Snow Pharmacy
A. R. Graham
D. W. Hughes
J. J. Cordell
H. C. Cordell
T. M. Withrow
J. T. Rogers
J. J. Brooks
W. L. Hawkins
I. C. Padgett
Ralph Bramlett
J. E. McFarland
Fate DeHart
T. M. Hyde
J. P. Stover
G. N. Green
Avery McGee
T. E. Anderson
E. B. Dills
Thos. C. Roach
W. D. Manning
J. H. Tilley
E. O. Baker
G. B. McBee
W. L. Sisson
R. L. Harris

H. L. Campbell
Julius Roberts
A. McDonald
Mattie Paynter
R. Bell
W. H. Barclay
A. H. Christy
W. P. Davis
P. B. Stuart
L. H. Thomas
G. T. Gunter
L. H. Abernathy
F. D. Higgins
Jason Botts
James McFarland
A. B. Beavers
L. M. Ferguson
J. P. Wilson
W. A. Beaver
J. L. Henry
E. E. Arp
O. P. Bell
G. C. Parris
J. W. Brown
H. C. Chastain
J. S. Cornett
W. C. Chastain
Sam A. Moore
L. D. Vaughn
Robert Clayton
J. H. Clouts
J. C. Kincaid
H. J. Cordell
M. L. Kincaid
J. C. Bell
A. L. Thompson
W. J. Helton

J. M. Stuart
H. A. Hallbrooks
S. D. Hallbrooks
J. E. Fouts
T. S. Simmonds
J. A. Hallbrooks
J. J. Ellis
E. G. Gaddis
H. J. McDonald
David York
Elijah Roach
S. Hunt
I. G. Queen
J. L. Owenby
G. M. F. Sullivan
A. J. Carney
F. T. Davis
R. L. Peoples
F. W. Ellis
M. B. Simpson
O. R. Auliam
G. L. Roach
G. C. Abernathy
J. W. Chancey
R. L. Brown
Earl Auburn
O. E. Watson
J. F. Kilpatrick
V. E. Addington
W. B. Phillips
G. E. Long
Amos McDonald
T. C. Keenum
K. A. Patten
G. C. Suttles
J. W. Cady
M. I. Moore

Henry Suit
S. E. Clouts
A. W. Water
C. M. Shearer
A. Bennett
T. L. Newman
W. M. Stower
J. M. York
D. C. Callahan
B. F. German
C. H. Garland
L. W. Williams
C. M. Godfrey
E. H. Denny
Roy E. Spargo
F. M. Roberts
Carl Long
O. H. Runion
T. C. Johnson
J. G. Cole
J. H. Marchand
G. T. Blackwell
J. A. Payne
W. M. Garrett
James King
J. H. Allen
C. E. Wood
E. J. Patterson
O. G. Wallace
C. F. Yoder
A. L. Weaver
James Thompson
B. E. Sisson
F. G. Creasman
J. E. Marshall
J. E. Rymer
W. I. Garrett

W. T. Davis
R. B. Hammonds
F. E. Dyke
I. N. Hibbitt
H. B. Pastell
M. H. Campbell
J. W. Keenum
L. S. Weaver
T. O. McDonald
J. B. Davis
Drew Shelton
W. Amos Cleve
C. V. Cain
A. H. Mason
J. L. Hopkins
S. C. Blackwell
A. L. Marrow
Henry Hyatt
W. A. Worcer
J. L. Sopington
Kenneth D. Kahn
W. R. Brook
H. E. Broughton
E. D. Conroy
Gus Nolde
A. C. Chastain
H. C. Earley
L. L. Lauthermilk
H. P. Barnett
W. A. White
Fred Bands
Will May
J. E. Ellis
A. Porter
W. R. Smith
J. F. Fostner
J. A. Townsend
H. H. Sneed
J. D. Patterson
F. H. White
C. W. Cross
T. L. Ellis
M. Hamby
J. C. Christy
W. H. Porter
W. C. Cannon
A. L. Trent
J. W. Kilpatrick
S. A. Craig
F. L. Moore
M. L. Brown
V. H. Waldrops
M. Payas
J. H. Long
Albert S. Harwell
D. B. Turner
C. E. Lanier
C. A. Stahl
W. E. Robinson
J. J. Stuart
W. H. Williams
J. L. Williams
W. R. Ross
A. B. Close
B. F. Worley
Tom L. Wood
C. T. Wood
R. L. Freeman
B. L. Patterson
G. B. Farris
R. H. Jones
C. R. Crawford
J. A. Hubbard
J. H. James

B. G. Cross
Bill Jones
C. A. Adams
L. A. Verner
A. C. Sims
Taylor Vermer
F. Ferguson
J. N. Lillard
W. W. Stilley
B. D. Elliott
W. C. Poss
V. G. Boggs
J. G. Cole
G. C. Roper
J. H. Payne
D. E. Patterson
W. N. Hawkins
W. C. Wilson
C. E. Small
Rollin Hughes
J. B. Shields
F. M. Geisler
P. J. Woods
J. A. Long
R. E. Picrelvines
C. Wigingion
W. B. Boggs
D. A. Pinyon
A. G. Fox
L. M. Mondy
H. P. Pritchard
R. L. Baugh
R. T. Cully
J. N. Holbrooks
T. H. Fowler
W. A. Burges
J. A. Boring

P. E. Carter
G. W. Morgan
M. M. Bailey
E. J. King
O. E. Newman
L. M. Wilson
J. A. Carter
E. V. Newman
G. W. Loudermilk
J. R. King
L. W. Loudermilk
D. L. Ellard
L. V. Wenhowes
J. H. Sullivan
H. K. Stilley
J. T. Helton
G. B. Wall
G. G. Proper
J. R. Duvall
J. E. Wallace
W. H. Vance
E. L. Weaver
H. B. Scott
J. R. Gladys
D. W. Long
C. A. Clemmer
J. M. Patterson
J. M. Mull
J. L. Patterson
H. T. Shields
W. A. Ellrod
E. A. Barnes
C. A. Bell
C. A. Davis
W. F. Johnson
W. A. Culberson
G. J. Hughes

N. J. Willis
B. W. Helton
J. B. Rose
H. C. Hampton
T. E. Elliott
Thos. Crozer
Grant Simmonds
W. L. Prince
J. M. Ellis
W. A. Membree
A. M. Baker
G. F. Fostner
J. M. Gans
C. B. Pittman
R. Rittman
O. N. Burgess
S. W. Sileson
J. A. Sileson
G. T. Laney
J. L. Cole
E. J. Taylor
H. L. Addington
Will Miller
E. L. McConnell
A. M. O'Kelly
J. T. Freeman
W. D. Byrd
Lee Davis
W. H. Taylor
J. S. Bryson
T. A. Hill
T. R. Marchbanks
Julius Cole
R. B. Rymer
T. J. Addington
E. M. Harbison
Henry Worley
J. C. Richards
J. A. Allen
A. F. Hill
R. S. Simpson
C. C. Simmonds
C. F. Anderson
J. E. Guy
L. J. McDonald
J. F. York
E. P. Hawkins
John Hall
R. Cotrill
J. E. Quinn
R. L. Mann
B. H. Stanley
S. H. Welch
J. J. Ballew
O. E. Raper
J. W. Cash
W. L. Chastain
Freemont Elliott
J. B. Standridge
J. B. Clouts
J. R. Verner
J. D. Carroll
R. A. N. Shields
R. I. Olney
M. L. Clements
B. H. Helton
D. A. Bell
J. O. Tilson
G. M. Dean
W. H. McDonald
R. L. Garland
M. C. Tallent
Lewis Hyde
G. M. Long

W. H. Headden
Ed Hellerstedt
J. E. Showalter
T. O. Sisson
Z. Collins
Lon Hawkins
W. E. Cochran
J. F. Curtis
W. C. Hyde
F. M. Poe
W. A. Curtis
S. G. German
J. H. Poe
W. E. Guy
R. H. Jones
J. C. Parris
J. M. Taylor
T. H. Fostner
C. J. Hogsed
F. P. Ferguson
T. W. Gass
M. C. Culbertson
J. L. Culbertson
W. E. Bell
P. L. Montgomery
J. F. E. Mull
A. M. Ammons
C. M. Briant
M. L. Meyers
J. D. Vance
C. C. Hawkins
E. M. O'Neal
R. B. Hall
G. W. Hamby
J. B. Dishroom
W. J. Welch
L. A. German
A. J. Parris
W. F. Russell
J. H. Center
Dr. S. B. McClary
J. T. Albritton
N. A. White
Lake F. Russell
John W. Wilwon
R. J. Godfrey
T. A. Magness
A. E. Botts
J. H. Cornett
W. M. Brooks
F. B. Singleton
F. A. Ferguson
J. H. Jargent
J. M. Hawkins
J. B. Johnson
R. C. Plumley
C. H. Humphrey
R. W. Null
F. M. Parris
T. W. Duckett
A. J. Bryant
Garnett Anderson
T. M. Jones
B. L. Umphrey
W. L. Bramlett
E. E. Hawkins
H. M. Bramlett
J. E. Ammons
T. J. Epperson
W. F. Daniel
F. H. Allen
F. W. Allen
B. E. Biggs
G. W. Harbison

W. G. Bates
Dan Hicks
Lynn M. Hicks
J. D. Clemner
J. L. Bishop
D. W. Dodson
M. S. Waldrop
O. H. Gillespie
Will Miller
Parks Hyatt
W. S. Wallace
E. S. Spargo
J. Cress
J. H. Hensly
C. M. Campbell
Bob Cole
J. T. Crain
W. T. Brock
E. Parris
H. L. Ledford
J. H. Dockey
J. E. Halbrooks
J. L. Westmoreland
Geo. T. Hood
L. E. Reese
O. N. Burgess
O. A. Roberts
N. H. Ecarly
R. T. Lovingood
I. H. Harris
J. L. Burger
D. W. Jenkins
M. P. Corbin
J. L. Adams
M. Johnson
Dr. A. J. Guinn
J. L. Simonds

F. P. James
Gay Partelle
Charles E. Taylor
Julius E. Taylor
W. A. Taylor
T. R. Marchant
T. E. Reed
J. L. Gourley
G. W. Hopkins
W. W. Harbison, Jr
M. C. Worley
Sam Headdon
J. B. Corbin
J. K. Reid
W. H. Cheatham
Joe Williams
J. R. Weaver
J. J. Wilson
John Stillwell
R. M. Morrow
R. Stillwell
J. W. Payne
J. L. Cheatham
V. Cheatham
C. F. Taylor
A .C. Barnes
G. F. Wilson
E. P. Wallace
O. W. Smith
R. L. Hill
B. L. Kilpatrick
J. G. Smith
B. C. Cheatham
M. R. Morgan
L. F. Bulillf
W. M. Sisson
T. H. Weaver

A. Worley
J. W. Hughes
A. M. Marr
J. T. McMillan
J. E. Harris
Dave Cable
H. L. Johnson
T. L. Ark
O. W. Beaver
B. F. Hall
W. Whitfield
E. C. Taylor
M. V. Prince
Chas. Skillman
Thos. DeLozier
H. M. Gilstrap
E. L. Stephenson
G. W. Cates
L. N. Marr
E. S. Pate
J. M. Melhorn
H. C. Cheatham
W. F. Hughes
John Richardson
J. E. Suit
J. E. Rollins
W. F. Lamsreaux
F. R. Smally
Jim Cross
J. M. Shorley
August Fisher
E. C. Tate
J. L. Lanning
E. M. Veydes

John Pack
W. J. Baliler
C. E. Horton
C. E. Horton
D. Horton
W. L. Fostner
V. R. Bell
M. P. Martin
B. L. Martin
A. J. Johnson
J. C. Addington
J. T. Quinn
G. W. Johnson
Jas. Hetlan
M. H. Kimsey
S. A. Passmore
W. H. McFarland
D. L. Swanson
R. J. Myers
P. L. Robinson
W. R. Ball
R. L. Wehunt
T. N. Johnson
G. W. Rossmore
J. E. Burger
T. W. Kimsey
I. E. McDougle
D. J. Johnson
S. D. Horton
J. P. Davis
W. M. Hensley
James Cheatham
W. G. Beaver
J. H. Hall

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JAMES D. MAHER
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# Supreme Court of the United States

October Term 1915

No. 1.—Original

IN EQUITY

THE STATE OF GEORGIA, *Complainant*

*vs.*

THE TENNESSEE COPPER COMPANY AND THE DUCKTOWN SULPHUR, COPPER AND IRON COMPANY, LIMITED, *Defendants*

## OBJECTIONS OF COMPLAINANT TO MOTION OF DEFENDANT, DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED, FOR MODIFICATION OF DECREE, AND CONSENT TO MOTION OF SAID DEFENDANT TO WITHDRAW EXHIBITS

CLIFFORD WALKER,
MARK BOLDING,
J. A. DRAKE,
LAMAR HILL.
*Solicitors for Complainant.*

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IN THE SUPREME COURT OF THE UNITED STATES.

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|---|---|
| THE STATE OF GEORGIA,<br>*Complainant,*<br>*vs.*<br>TENNESSEE COPPER COMPANY AND DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED,<br>***Defendant.*** | No. 1, Original. |

OBJECTIONS OF COMPLAINANT TO MOTION OF DEFENDANT, DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED, FOR MODIFICATION OF DECREE HERETOFORE ENTERED.

Now comes the complainant, the State of Georgia, and by leave of the Court first had and obtained, files these, its objections to the motion of the defendant, the Ducktown Sulphur, Copper and Iron Company, Limited, for modification of the decree heretofore rendered.

In June, 1915, this Honorable Court rendered its decree restraining the defendant above named from permitting the escape into the air from its works, fumes carrying more than 45 per cent of the sulphur contained in the green ores smelted at its plant,

and further restraining said defendant from permitting, from the 10th day of April to the 1st day of October in any year the escape into the air of gases, the total sulphur content of which shall exceed twenty tons during one day and exceeding at other times during any year forty tons per day, and further, appointing Dr. J. T. McGill as inspector to observe the operations of the defendant's plant and works with free access to its books, records and premises for a period of six months, and directing him to make observations as set out in said decree, and at the end of six months to make full report of his observations to this Honorable Court, accompanying them by recommendations as to appropriate future action.

On the 1st day of January, 1916, the report of the said inspector was filed, such report going into great detail as to the operation of the plant, conditions at the works and plant of the defendant and the adjacent territory, and containing recommendations as to the form of decree to be handed down by this Honorable Court. Upon this report and recommendations, the defendant, the Ducktown Sulphur, Copper and Iron Company, Limited, filed its motion and petition for the dismissal of this cause and filed a brief and argument in support thereof. The complainant filed its objections thereto and also submitted its form of final decree.

Upon consideration, this Honorable Court handed down its final decree of injunction on the 3d day of April, 1916, in which it permanently restrained and

enjoined the defendant, the Ducktown Sulphur, Copper and Iron Company, Limited, from permitting to escape into the air from its works, fumes carrying more than 45 per cent of the sulphur contained in green ores subjected to smelting; and further providing that it shall not, from April 10th to October 1st, in any year, permit the escape into the air of gases the total sulphur content of which shall exceed 25 tons during one day and not more than 50 tons per day shall be permitted at any other time, and further ordering that the said defendant keep a daily record of the operations of its plant.

It is submitted that the last decree of April 3d, 1916, was a final decree of permanent injunction rendered after consideration of the motion of the defendant to dismiss the cause or modify the decree, the same motion which is now being made in behalf of the defendant in the form of a petition to intervene by the State of Tennessee and by the defendant in its motion to modify the decree, and that neither the defendant nor the State of Tennessee as intervenor can be heard to ask any change or modification of the final decree of this Court when the said cause as to this defendant has been finally determined.

This cause was determined originally in 1907 after the Court had considered the evidence of some hundreds of witnesses and the Court then held that the State of Georgia was entitled to a decree of injunction and that the defendants were maintaining a nuisance (Georgia vs. Tennessee Copper Co., et al., 206 U. S., p. 239) but the State, upon representations

by the defendant that it could and would make great improvements in its plant and that the nuisance would be abated, allowed the defendant to continue operations. However, in 1913, upon continued complaint of the citizens of the affected territory, the State of Georgia filed its motion for final decree of injunction. Upon representations by the defendant that it could show improved conditions and that no damage was being done by it the Court again heard the evidence of a vast number of witnesses for complainant and defendant, and after argument of counsel handed down its decree of June 1st, 1915, and again on April 3d, 1916, after the filing of the report of the inspector handed down its final decree of injunction.

It is respectfully submitted by the complainant that this motion for modification of the decree filed by the defendant is remarkable in that it is asking this Honorable Court to set aside or modify all of its former rulings, decisions and decrees and undo all that has been done upon the mass of testimony which was submitted, without setting out one new fact or reason why the same should be done.

Every fact, circumstance and argument presented in this motion by defendant has been presented to the Court on many previous occasions in efforts to have done exactly what is now sought, a modification of the decree or a dismissal of the case, and each time the Court has decreed against them. We submit that the company is estopped from further seeking to do that which it has so often sought, and which each time has been denied.

The defendant has argued that

> "the fair interpretation of the report of the inspector shows that he meant to report and recommend that the defendant, the Ducktown Sulphur, Copper and Iron Company, Limited, should be permitted to allow a daily escape of gases carrying 40 tons of sulphur content from May 1st to October 1st each year; and correspondingly during the remaining period, 80 tons of sulphur a day. And that by the term 'sulphur content' he did not mean 'sulphur dioxid' but sulphur proper."

It is submitted that this contention was argued and was considered by this Honorable Court on the motion of the defendant to dismiss the cause, based on Dr. McGill's report. It appears that the defendant has labored and is laboring, as is the State of Tennessee, under a misapprehension as to the purpose of Dr. McGill's appointment. We submit that it was not the purpose of this Honorable Court in the appointment of an inspector, to allow whatever report and recommendations were made by him to abrogate, set aside and discredit the testimony of hundreds of citizens residing in the affected territory offered by the complainant and upon whose testimony the decree of this Court was based, nor was the report nor the recommendations of Dr. McGill to be binding or controlling on the Court, but was simply to be received by it as other evidence in the cause to be given such weight as the Court should see fit to

give it. He was merely occupying an advisory position but the defendant bases its argument on the theory that this Court *must* follow the recommendations of Dr. McGill and is absolutely bound by them; in other words that Dr. McGill is to alone decide the merits of this cause and to set at nought the findings which the Court has already made.

Conceding, but it is not conceded, that the inspector meant what the defendant contends, this court has taken the report into consideration and has seen fit to formulate a decree according to its own opinion and judgment and not to follow the recommendations of such report though the Court did increase the maximum amount of escaping gases over that provided in its decree of June 1st, 1915.

Defendant has misunderstood Dr. McGill's report. But it is submitted by complainant that the Court's decree was rendered with full understanding and consideration of the recommendations of the inspector.

It is argued by defendant that the report of Dr. McGill was not excepted to by complainant. It was not necessary for the State of Georgia to except. This Honorable Court had appointed its own inspector for its own satisfaction and he was, therefore, an officer of the Court and the Court would render such decree upon his report as it saw fit without recommendation or suggestions by counsel for either complainant or defendant. Defendant contends that no one has challenged either the facts Dr. McGill related or the recommendations he made. We submit

that any change in the former decree of the Court was objected to by the formal objections filed by complainant, by its form for final decree and above all by the testimony of hundreds of its citizens in this cause.

Counsel for defendant argues that the State of Georgia offered this defendant quiesence for a yearly indemnity of $8,500. We submit that this statement is unworthy of argument and unwarranted by the facts. The stipulation with the Tennessee Copper Company, the other defendant in this cause, is of record in this Court, having been allowed by the Court to be placed on file and the continuance of the cause as to the Tennessee Copper Company for three years being permitted. Such stipulation was identical with the one offered this defendant, except as to the amount to be deposited for payment of damages to complainant's citizens. The moving consideration for this stipulation, which was authorized by the Legislature and the Governor of Georgia, was not the pittance of $16,500 in the case of the Tennessee Copper Company nor the $8,500 in the case of this defendant, but was the agreement to control the emission of its fumes during the growing season for crops, and thereby bring about what the State had so long sought, the protection of its citizens and its territory. It was further agreed in such stipulation that improvements should continue to be made by the company in the effort to control the fumes. The small sums named were deposited for award by arbitration to small claimants for damage in the event that some slight injury should be caused in

spite of all precautions by the company, and where the damage was too slight to warrant the employment of counsel. These sums of money have never and were never intended to be paid into the Treasury of the State of Georgia as is intimated in argument of counsel, nor were they to be paid to any official of the State save that the arbitrators appointed by the Governor to award such sum were to draw their remuneration therefrom.

As to the contention of the defendant that this cause has been continued from time to time without its consent by the State of Georgia, such statement is not warranted by the facts.

Since 1907 a vast amount of evidence has been submitted by both parties and an inspector appointed and a thorough investigation made with a view of determining the form of such decree. Upon consideration of the same the Court on April 3d, 1916, determined such form and entered its final decree of injunction and we submit that the issue has been determined and the case closed, and that such decree is final and permanent.

We respectfully ask that the motion of the defendant be denied.

CONSENT TO WITHDRAWAL OF EXHIBITS BY DEFENDANT, THE DUCKTO N SULPHUR, COPPER & IRON COMPANY, LIMITED.

Complainant makes no objection, and with the permission of the Court, consents to the motion of the defendant the Ducktown Sulphur, Copper and

Iron Company, Limited, to withdraw color photographs and accompanying apparatus previously filed, and exhibited on the hearing at the October Term, 1914. We respectfully ask that if such motion is granted, the order allowing such withdrawal will also allow the withdrawal by the complainant of such exhibits as she may have on file and which were exhibited on the hearing at the October Term, 1914.

Respectfully submitted,

CLIFFORD WALKER,
MARK BOLDING,
J. A. DRAKE,
LAMAR HILL,
Solicitors for Complainant.

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Office Supreme Court, U.S.
FILED
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IN THE

# Supreme Court of the United States

OCTOBER TERM, 1916

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STATE OF GEORGIA,
By Its Attorney-General,
*Complainant,*

*vs.*

TENNESSEE COPPER COMPANY, et al.,
*Defendants.*

Original Cause.
No. 1,
In Equity.

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## JOINT MOTION OF THE STATE OF GEORGIA AND OF TENNESSEE COPPER CO., TO FILE A STIPULATION WITH THE APPROVAL OF THE COURT.

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CLIFFORD WALKER,
Attorney General for the State of Georgia.
JOHN D. LITTLE,
ARTHUR G. POWELL,
MARION SMITH,
MAX F. GOLDSTEIN,
Attorneys for Tennessee Copper Co.

JOHNSON-DALLIS CO., SERVICE, ATLANTA

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1916

---

STATE OF GEORGIA,
By Its Attorney-General,
*Complainant,*

*vs.*

TENNESSEE COPPER COMPANY, et al.,
*Defendants.*

Original Cause.
No. 1,
In Equity

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Now comes the State of Georgia by its Attorney-General, Clifford Walker, and the Tennessee Copper Company by its counsel, John D. Little, Arthur G. Powell, Marion Smith and Max F. Goldstein, and join in representing to the Court that in pursuance of a joint resolution of the General Assembly of the State of Georgia, approved by the Governor of the State of Georgia on the 4th day of August, 1916, a certain contract respecting the subject matter of the foregoing litigation has been entered into between the State of Georgia through its Governor and the Tennessee Copper Company, subject to its being permitted by this Court to be filed or entered in the above entitled cause in this Court in lieu of existing stipulations. A copy of said contract is hereto attached marked exhibit "A" and made a part of this motion, with the usual prayer for reference.

Wherefore, the parties aforesaid, through their respective counsel aforesaid, move the Court that said agreement and contract be filed in said Court in lieu of existing stipulations between the parties, and that the same be allowed and approved by this Court.

STATE OF GEORGIA,

by Clifford Walker

Attorney-General.

TENNESSEE COPPER CO.,

by John D. Little

Arthur G. Powell

Marion Smith

Max F. Calvert

of Atty.

EXHIBIT A.

STATE OF GEORGIA,
COUNTY OF FULTON.

Whereas, the General Assembly of Georgia did by a resolution approved August 4th, 1916, authorize and direct the Governor of said State to enter into a new contract and stipulation with Tennessee Copper Company for a term of three years from the first day of October, 1916, upon the terms and conditions of the present contract between the

State of Georgia and said Tennessee Copper Company, with certain exceptions as in said resolution approved August 4th, 1916, set forth; and

Whereas, since the passage of said resolution by the General Assembly of Georgia and its approval by the Governor, the Directors of the Tennessee Copper Company have met, pursuant to the by-laws of said company, and adopted the following resolution, to-wit:

> "*Resolved,* by the Board of Directors of Tennessee Copper Company that the President of the company be, and he is hereby authorized and directed for and in behalf of Tennessee Copper Company to enter into a renewal of the agreement and stipulation with the State of Georgia upon the terms and conditions of the present agreement and stipulation, with the exceptions as set out in the resolution directing a renewal of said contract passed by the General Assembly of Georgia at its 1916 session, approved by the Governor August 4th, 1916, for a term of three years from October 1st, 1916.
>
> *Resolved,* further, that the terms and conditions of the new contract to be entered into as set forth and contained in the resolution of the General Assembly of Georgia, passed at its 1916 session be and the same are accepted and assented to by Tennessee Copper Company."

Now, therefore, Nat E. Harris, Governor of the State of Georgia, and for and in behalf of said State acting by and under the authority of said resolution approved August 4th, 1916, and in pursuance thereof, and the Tennessee Copper Company, a corporation, acting by and through

Utley Wedge, its President, have and do hereby enter into the following agreement and stipulation, to-wit:

IN THE SUPREME COURT OF THE UNITED STATES,
October Term, 1916.

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|---|---|
| STATE OF GEORGIA BY ITS ATTORNEY GENERAL, Complainant, *vs.* TENNESSEE COPPER COMPANY, ET AL., Defendants. | Original Cause, No. 1 In Equity. |

AGREEMENT AND STIPULATION.

In the above entitled cause it is agreed and stipulated by and between the State of Georgia, by and through His Excellency, Nat E. Harris, Governor of said State, hereinafter called the State, and the Tennessee Copper Company, hereinafter called the company, as follows:

1. The company agrees that it will maintain and operate its acid plant and its acid making appliances and its processes at the highest practical state of efficiency.

2. The company further agrees that from and after October 1st, 1916, and between the 10th day of April and the first day of October, both inclusive, of each and every year, beginning with the year 1917, it will not, during the life of this agreement, operate more green ore furnaces

than it finds necessary to permit of operating its sulphuric acid plant at its normal full capacity.

3. The company shall make sworn reports to the Governor of the State, or such person as he may designate, as to the tonnage of green ore smelted and tonnage of acid made during the operation of this contract, such reports to be made at such intervals, and in such form and manner as may be prescribed by the Governor of the State, or such person as he may designate, with full right on the part of such persons as the Governor may designate, to inspect the plant of the company, at such time or times, and for such period of time during the life of this contract between said dates of each year as to the Governor may seem advisable or necessary for his information as to such tonnage of ore smelted and acid made during said period from year to year, the compensation of such inspector not to exceed $125.00 per month during the time engaged in such work, to be paid by the Tennessee Copper Company under warrant of the Governor, exclusive of the amount of $16,500.00 hereinafter provided for.

4. The company agrees to pay such awards as may be made for damages caused by sulphur dioxide gases from the plant of the company by a Board of Arbitrators to be constituted as provided for in paragraph five hereof, up to the sum of $16,500.00 per annum, less the expenses herein provided to be annually deducted from said amount, which payments shall be made within ten days after filing thereof with the Governor and notice thereof to the Tennessee Copper Company. The expense provided to be paid by Tennessee Copper Company and deducted from the aggregate amount of its liability hereunder for awards and expenses

shall be paid upon warrants or drafts drawn by the Governor on said Tennessee Copper Company as and when such expenses are due. Should the amounts paid out in awards for damages as aforesaid and expenses hereunder during any year be less than $16,500.00 and the amount of awards and such expenses accruing for any succeeding year exceed $16,500.00, then the company shall be liable to the extent of the difference between $16,500.00 and the amount actually paid out for awards and expenses, it being the intention to make the liability cumulative, but in no event to exceed $49,500.00 during the three years provided for in this contract.

The Tennessee Copper Company further agrees that it will within ten days from the execution of this contract file with the State of Georgia a bond in the sum of $49,500.00 with some good and solvent surety company authorized to do business in this State and approved by the Governor, as the surety thereon, which said bond shall be conditioned for the payment of each and every award made within the limits and under the terms of this contract, and each and every item of expense due to be paid by the Tennessee Copper Company as and when the same becomes due under this contract, by the terms of which said bond the surety company shall agree to pay said awards and such expenses as and when they become due, in the event the Tennessee Copper Company fails to pay them or any of them, as a primary obligation and not as guarantor.

5. The Board of Arbitration in the last preceding paragraph referred to shall be composed as follows: The Tennessee Copper Company shall appoint one Arbitrator, whose compensation and expense shall be paid by Tennessee Cop-

per Company. The Governor of the State shall appoint one Arbitrator who shall be known as the "State's Arbitrator" and who shall be a citizen of the alleged affected territory, that is to say, of one of the three counties of Fannin, Gilmer or Union. The said Arbitrator shall have his compensation and actual expenses paid by Tennessee Copper Company on warrant or draft drawn by the Governor as aforesaid, and the amounts so paid shall be charged against the total annual liability of $16,500.00 herein provided for, and shall constitute a discharge of so much of said liability as is represented by said amounts.

The Governor shall also appoint a referee who shall, when necessary, and upon notice as hereinafter provided for, act as a standing umpire, and whose compensation and actual expenses, while engaged in the work of such Board shall be paid, one-half by the Tennessee Copper Company, and one-half out of said fund. The said referee or umpire shall not be a citizen of either of the counties of Fannin, Gilmer or Union.

The decision of the Arbitrator for the State and for the company in cases where they agree shall be rendered in writing and shall be final.

Whenever said two Arbitrators cannot agree, they or either of them, shall notify said umpire by such notice as may be prescribed under the rules and regulations mentioned in the sixth paragraph hereof, and the decision of any two of the three members of said Board so constituted shall be final.

Said Arbitrators shall personally investigate each claim submitted for arbitration hereunder by the citizens of

Georgia for damage to their crops or timber caused by sulphur dioxide fumes from the plant of the company, and shall appraise such damage, if any, and shall make an award in cash therefor, which award shall be paid upon warrant as may be prescribed in the rules referred to in section six.

The two Arbitrators and the referee or umpire named hereunder shall be appointed for the full term of said contract, and vacancies occurring by death or resignation shall be filled by the Governor or the Tennessee Copper Company, as the case may be, that is to say, if a vacancy shall occur as to the Arbitrator appointed under said contract by the Tennessee Copper Company such vacancy shall be filled by the Tennessee Copper Company, and if a vacancy shall occur either as to the Arbitrator to be appointed by the Governor, or the referee or umpire, such vacancy shall in either event be filled by the Governor, and the Arbitrator and umpire appointed by the Governor shall be removable for cause. The umpire appointed by the Governor shall draw as compensation a salary not to exceed one hundred and fifty ($150.00) dollars per month for the three years and actual expenses incurred while performing his duties as referee or umpire.

6. Immediately upon this contract becoming effective, or as soon thereafter as may be convenient, the Governor of the State of Georgia, or such person as he may designate, and a representative of the company shall meet and formulate rules and regulations for the government of the arbitration proceedings satisfactory to the Governor.

7. As stated before, the liability of the company hereunder is cumulative, and any part of the liability for any

year not consumed by awards and expenses as herein provided for that year shall be available, if necessary, to meet the awards and expenses for the succeeding year or years; and whenever such expenses and awards of the Board of Arbitration in the aggregate exceed $16,500.00 for any calendar year, such expenses shall be paid out of the liability available for the following year or years during the life of this contract under such conditions as may be prescribed by the rules mentioned in the sixth paragraph hereof.

The company agrees to be bound by each and every award made hereunder to the extent, but not in excess, of the liability contracted for by it under this contract.

8. No citizen of the State of Georgia, having or claiming to have any right of action for damages on account of injury, shall be bound by the terms of this contract, unless such citizen shall voluntarily submit his claim to arbitration under the rules and regulations referred to in paragraph sixth.

9. The State agrees that, provided this contract shall not be breached by the company, it will not, within at least three years from and after October 1st, 1916, apply for injunctive or other relief against the Tennessee Copper Company in the above entitled matter. Upon the termination of this agreement, whether by breach by the Tennessee Copper Company or by lapse of time, the rights and defenses of the parties hereto shall not be abridged, and the status of the above entitled cause shall be as though no contract had been entered into between the parties, and the State shall have the right to undertake to obtain relief therein, and the company shall have the right to undertake

to make defense thereto, except that upon cancellation or termination hereof as above provided, the company agrees that it shall not have the right to and will not make the defense that the State has waived or been deprived of the right to an ultimate decree of injunction because this contract has been entered into between the parties hereto.

10. Whenever, from time to time, in the opinion of the Governor of the State, there shall arise the necessity for a determination of the bona fide performance of this contract, then upon thirty days written notice to the company, addressed to it at No. 2 Rector Street, New York City, the company shall appoint one arbitrator of its own selection; the State of Georgia, by the Governor, shall appoint the State Chemist of the State of Georgia, or such other person as the Governor may deem proper, as arbitrator for the State; and such two arbitrators shall select some competent person as umpire, and in the event said two arbitrators cannot agree on an umpire, then such umpire shall be appointed by the President of the University of Virginia; which Board so created shall determine the question of the bona fide performance of this contract, and a majority finding of such Board on that question shall be final and binding upon the parties hereto, and in the event such finding is that there has been a breach of this contract by the company, the State may thereupon at its election, treat this contract as at an end, and the status of the above entitled cause shall thereupon be as though no contract had been entered into between the parties, and the State shall have the right to undertake to obtain relief therein, and the company shall have the right to undertake to make a defense thereto. In the event of cancellation, as provided in this

clause, the liability of the company to the extent of that current year's liability (that is to say, the year in which the cancellation occurs) shall nevertheless remain in full force and effect for the purpose of paying awards under this contract for damages occurring prior to such cancellation, to the extent of the liability provided for such year hereunder.

11. Neither of the parties hereto admits any of the claims or contentions of the other parties hereto in the above entitled cause, and nothing herein contained shall be construed as any admission by the company that any damage is now being or will hereafter be done to property of citizens of Georgia or to the State of Georgia.

12. This contract unless terminated by breach as provided in paragraph ten shall remain in effect for at least the period of time hereinbefore provided. It shall continue thereafter unless at least six months previous notice in writing shall be given by either party to the other party of its intention to terminate the contract.

This contract is made subject to its being permitted by the court to be filed or entered in the above entitled cause in the Supreme Court of the United States, in lieu of existing stipulations.

IN WITNESS WHEREOF, the said Nat E. Harris, Governor of the State of Georgia, has hereunto attached his official signature and the seal of the executive department, and the said Tennessee Copper Company has by its President, Utley Wedge, signed and executed this Agreement and Stipulation, and attached the corporate seal of said cor-

poration, on this the 30th day of September, A. D., Nineteen Hundred and Sixteen.

Executed in triplicate.

N. E. HARRIS, Governor.

By the Governor,
F. R. JONES.
Secretary Executive
Department

TENNESSEE COPPER COMPANY,

By UTLEY WEDGE, President.

By FRANK H. RUDE, Secretary.

Test:
FRANK H. BUSH.

[Seal of the Executive Department of the State of Georgia.]

[Seal of Tennessee Copper Company.]

FILE COPY

Office Supreme Court, U. S.
FILED
JUN 9 1916
JAMES D. MAHER
CLERK

# Supreme Court of the United States

October Term 1915

No. 1.—Original

IN EQUITY

THE STATE OF GEORGIA, *Complainant*

*vs.*

THE TENNESSEE COPPER COMPANY AND THE DUCKTOWN SULPHUR, COPPER AND IRON COMPANY, LIMITED, *Defendants*

## OBJECTIONS TO MOTION AND PETITION OF THE STATE OF TENNESSEE FOR LEAVE TO INTERVENE

CLIFFORD WALKER,
MARK BOLDING,
J. A. DRAKE,
LAMAR HILL.
*Solicitors for Complainant.*

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IN THE SUPREME COURT OF THE UNITED STATES.

| | |
|---|---|
| THE STATE OF GEORGIA,<br>*Complainant,*<br>*vs.*<br>TENNESSEE COPPER COMPANY AND DUCKTOWN SULPHUR, COPPER & IRON COMPANY, LIMITED,<br>*Defendant.* | No. 1, Original. |

OBJECTIONS OF COMPLAINANT TO MOTION OF STATE OF TENNESSEE FOR LEAVE TO INTERVENE.

Now comes the complainant, the State of Georgia, and by leave of the Court first had and obtained, files these, its objections to the motion and petition of the State of Tennessee for leave to intervene in the above entitled cause.

In June, 1915, this Honorable Court rendered its decree restraining the defendant, the Ducktown Sulphur, Copper and Iron Company, Limited, from permitting to escape into the air from its works, fumes carrying more than 45 per cent of the sulphur contained in the green ores smelted at its plant and further restraining the said defendant from permitting,

from the 10th day of April to the 1st day of October in any year, the escape into the air of gases, the total sulphur content of which shall exceed 20 tons during one day and exceeding at other times during any year 40 tons per day and further appointing Dr. J. T. McGill as inspector to observe the operations of the defendant's plant and works with free access to its books, records and premises for a period of six months, and directing him to make observations as set out in said decree and at the end of six months to make full report of his observations to this Honorable Court, accompanying them by recommendations as to appropriate future action.

On the 1st day of January, 1916, the report of the said inspector was filed, such report going into great detail as to the operation of the plant, conditions at the works and plant of the defendant and the adjacent territory and containing recommendations as to the form of decree to be handed down by this Honorable Court. Upon this report and recommendations, the defendant, the Ducktown Sulphur, Copper and Iron Company, Limited, filed its motion and petition for the disissal of this cause and filed a brief and argument in support thereof. The complainant filed its objections thereto and also submitted its form of final decree.

Upon consideration, this Honorable Court handed down its final decree of injunction on the 3d day of April, 1916, in which it permanently restrained and enjoined the defendant, the Ducktown Sulphur, Copper and Iron Company, Limited, from permitting

to escape into the air from its works, fumes carrying more than 45 per cent of the sulphur contained in green ores subjected to smelting; and further providing that it shall not, from April 10th to October 1st in any year, permit the escape into the air of gases the total sulphur content of which shall exceed 25 tons during one day and not more than 50 tons per day shall be permitted at any other time, and further ordering that the said defendant keep a daily record of the operations of its plant.

It is submitted that the last decree of April 3d, 1916, was a final decree of permanent injunction rendered after consideration of the motion of the defendant to dismiss the cause or modify the decree, the same motion which is now being made in behalf of the defendant in the form of a petition to intervene by the State of Tennessee and by the defendant in its motion to modify the decree, and that neither the defendant nor the State of Tennessee as intervenor can be heard to ask any change or modification of the final decree of this Court when the said cause as to this defendant has been finally determined. The defendant surely cannot be so heard and we respectfully submit that to even a much less extent is a third party entitled to intervene.

This cause was determined originally in 1907 after the Court had considered the evidence of some hundreds of witnesses and the Court then held that the State of Georgia was entitled to a decree of injunction and that the defendants were maintaining a nuisance (Georgia vs. Tennessee Copper Co., et

al., 206 U. S., p. 239) but the State, upon representations by the defendant that it could and would make great improvements in its plant and that the nuisance would be abated, allowed the defendant to continue operations. However, in 1913, upon continued complaint of the citizens of the affected territory the State of Georgia filed its motion for final decree of injunction. Upon representations by the defendant that it could show improved conditions and that no damage was being done by it, the Court again heard the evidence of a vast number of witnesses for complainant and defendant, and after argument of counsel handed down its decree of June 1st, 1915, and again on April 3d, 1916, after the filing of the report of the inspector, handed down its final decree of injunction.

It is respectfully submitted by the complainant that this motion for leave to intervene filed by the State of Tennessee, is remarkable in that it is asking this Honorable Court to set aside or modify all of its former rulings, decisions and decrees and undo all that has been done upon the mass of testimony which was submitted without setting out one new fact or reason why the same should be done.

We submit that if the defendant will not be permitted to maintain a nuisance, the State of Tennessee can stand on no higher ground. Certainly the defendant company cannot do by indirection what it cannot do by direction and we respectfully submit that a change or modification in the decree which this Honorable Court has said was necessary to abate the nuisance, such change being made upon the mo-

tion of the State of Tennessee, would in effect permit Tennessee to maintain a nuisance not allowed defendant. The State, under the circumstances of the case, can stand on no different footing from one of its citizens and if the State owned and operated this plant it would not be permitted to so operate same as that it would be a nuisance, therefore, we submit, it cannot be heard to ask that one of its citizens be allowed so to operate it.

It is apparent on the face of this petition from whence it came. If the State of Tennessee was so vitally interested in its humble citizens and tax payers in Polk County, it should have long since awakened to the fact that they were suffering and needed its help.

Many years have passed since the beginning of this litigation and if the State desired to exercise its sovereign right of protection and its duty of defense of its citizens, its intervention should have been forthcoming before the entering of the final decree.

The State of Tennessee, through its Attorney-General, argues that in its opinion

> "the fair interpretation of the report of the inspector shows that he meant to report and recommend that the defendant, the Ducktown Sulphur, Copper and Iron Company, Limited, should be permitted to allow a daily escape of gases carrying 40 tons of sulphur content from May 1st to October 1st each year; and correspondingly during the

> remaining period, 80 tons of sulphur a day. And that by the term 'sulphur content' he did not mean 'sulphur dioxid' but sulphur proper.''

It is submitted that this contention was argued and was considered by this Honorable Court on the motion of the defendant to dismiss the cause, based on Dr. McGill's report. It appears that the State of Tennessee has labored and is laboring, under a misapprehension as to the purpose of Dr. McGill's appointment. We submit that it was not the purpose of this Honorable Court in the appointment of an Inspector, to allow whatever report and recommendations were made by him to abrogate, set aside and discredit the testimony of hundreds of citizens residing in the affected territory offered by the complainant and upon whose testimony the decree of this court was based, nor was the report nor the recommendations of Dr. McGill to be binding or controlling on the court, but was simply to be received by it as other evidence in the cause, to be given such weight as the court should see fit to give it. He was merely occupying an advisory position but intervenor bases its argument on the theory that this court *must* follow the recommendations of Dr. McGill and is absolutely bound by them; in other words that Dr. McGill is to alone decide the merits of this cause and to set at nought the findings which the court has already made.

Conceding, but it is not conceded, that the Inspector had meant what interventor contends, this

court has taken the report into consideration and has seen fit to formulate a decree according to its own opinion and judgment and not to follow the recommendations of such report though the court did increase the maximum amount of escaping gases over that provided in its decree of June 1st, 1915.

Intervenor has misunderstood Dr. McGill's report. But it is submitted by complainant that the court's decree was rendered with full understanding and consideration of the recommendations of the Inspector.

It is argued by the State of Tennessee that the report of Dr. McGill was not excepted to by complainant. It was not necessary for the State of Georgia to except. This Honorable Court had appointed its own Inspector for its own satisfaction and he was therefore an officer of the court and the court would render such decree upon his report as it saw fit without recommendation or suggestions by counsel for either complainant or defendant. Intervenor contends that no one has challenged either the facts Dr. McGill related or the recommendations he made. We submit that any change in the former decree of the court was objected to by the formal objections filed by complainant, by its form for final decree and above all by the testimony of hundreds of its citizens in this cause.

Counsel for Intervenor argues that the State of Georgia offered this defendant quiesence for a yearly indemnity of $8,500. We submit that this statement is unworthy of argument and unwarranted by

the facts. The stipulation with the Tennessee Copper Company, the other defendant in this cause, is of record in this court, having been allowed by the court to be placed on file and the continuance of the cause as to the Tennessee Copper Company for three years being permitted. Such stipulation was identical with the one offered this defendant, except as to the amount to be deposited for payment of damages to complainant's citizens. The moving consideration for this stipulation which was authorized by the Legislature and the Governor of Georgia, was not the pittance of $16,500 in the case of the Tennessee Copper Company, nor the $8,500 in the case of this defendant, but was the agreement to control the emission of its fumes during the growing season for crops, and thereby bring about what the State had so long sought, the protection of its citizens and its territory. It was further agreed in such stipulation that improvements should continue to be made by the company in the effort to control the fumes. The small sums named were deposited for award by arbitration to small claimants for damage in the event that some slight injury should be caused in spite of all precautions by the company, and where the damage was too slight to warrant the employment of counsel. These sums of money have never and were never intended to be paid into the Treasury of the State of Georgia as is intimated in argument of counsel, nor were they to be paid to any official of the State, save that the arbitrators appointed by the Governor to award such sum were to draw their remuneration therefrom.

As to the contention of the defendant that this cause has been continued from time to time without its consent by the State of Georgia, such statement is not warranted by the facts.

The taxable value of the defendant's property, on which so much stress has been laid by intervenor, this court has said it would not consider; that regardless of the value of the defendant's plants or of such millions as might be invested in them, if any damage was being done to Georgia's territory the nuisance must be abated and the injunction granted.

The case of Madison vs. the Copper Company, 113 Tenn., p. 331, cited by counsel for intervenor, is not applicable to the present issue. In that case there was a suit by private citizens for injunction against the defendant and the court held that their rights could be fully protected by suits for damage, and that the value of the defendant's plant as compared to the individual holdings of the plaintiffs was so much greater that it would not be authorized to grant the injunction. In the instant case, however, the application is made by the State of Georgia in her sovereign capacity for the purpose of protecting and saving its public domain and abating a nuisance. It does not come seeking damage for injury to property but exercising its sovereign right of protection of its territory it asks that the injunction issue. As long ago as 1907 this contention of the State of Georgia was sustained by this Honorable Court and it was solemnly decreed that the State was entitled to an injunction against these companies and that the

latter were in fact maintaining a nuisance. The only thing left to be considered was the form of decree.

Since 1907 a vast amount of evidence has been submitted by both parties and an inspector appointed and a thorough investigation made with a view of determining the form of such decree. Upon consideration of the same the court on April 3rd, 1916, determined such form and entered its final decree of injunction and we submit that the issue has been determined and the case closed, and that such decree is final and permanent.

We respectfully ask that the motion of the State of Tennessee for leave to intervene be denied.

Respectfully submitted,

CLIFFORD WALKER,
MARK BOLDING,
J. A. DRAKE,
LAMAR HILL,
Solicitors for Complainant.

FILE COPY.

Office Supreme Court, U. S.
FILED
APR 7 1917
JAMES D. MAHER
CLERK

# In the Supreme Court of the United States

OCTOBER TERM, 1916

STATE OF GEORGIA,
*Complainant.*
v.
THE TENNESSEE COPPER COMPANY
and
THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY, Limited,
*Defendants.*

No. 1, Original.

## PETITION AND MOTION OF INTERVENOR, STATE OF TENNESSEE, FOR MODIFICATION OF FORMER ORDERS AND DECREES.

FRANK M. THOMPSON,
*Attorney-General of Tennessee.*

JOE V. WILLIAMS,
*Of Counsel.*

ASA PRINTING COMPANY, CHATTANOOGA.

# In the Supreme Court of the United States

OCTOBER TERM, 1916

| | |
|---|---|
| STATE OF GEORGIA, *Complainant.* v. THE TENNESSEE COPPER COMPANY and THE DUCKTOWN SULPHUR, COPPER & IRON COMPANY, Limited, *Defendants.* | No. 1, Original. |

## PETITION AND MOTION OF INTERVENOR, STATE OF TENNESSEE, FOR MODIFICATION OF FORMER ORDERS AND DECREES.

TO THE HONORABLE COURT:

Petitioner (Intervenor) The State of Tennessee, on June 12, 1916, was granted leave to intervene as follows:

> "ON CONSIDERATION of the motion of the State of Tennessee for leave to intervene herein,
>
> "IT IS NOW HERE ORDERED BY THE COURT that the motion be and the same is hereby granted."

Above order was passed pursuant to prayer of the Intervenor's previous petition, which prayer was:

> "Wherefore, the State of Tennessee petitions to become a party to this suit, to the end that it may ask, on behalf of Ducktown Sulphur, Copper & Iron Company, Limited, a modification of the decree heretofore entered, conformably to the recommendation of Dr. John T. McGill."

Petitioner conceived and here respectfully submits that the Report and recommendations of Prof. John T. McGill (Inspector appointed by the Court) have been misunderstood and incorrectly interpreted and applied.

Intervenor has accordingly notified complainant that on April 9, 1917, it will move a modification of former orders and decrees herein.

The original of said notice, embodying such motion, is on file in this Court and is as follows:

> "To the Attorney-General of Georgia,
> "Atlanta, Georgia:
>
> "You are hereby notified that on Monday, April 9, 1917, the undersigned, on behalf the State of Tennessee, (intervenor herein) will, in open Court, move a modification of former orders and decrees, and to have entered herein a decree and order in the words and figures following:
>
> > "The restrictions and limitations heretofore placed on The Ducktown Sulphur, Copper & Iron Company, Limited, and its operations are in all respects removed, *except* 'That, in ordinary conditions of the atmosphere, the gases escaping into the atmosphere from such operations shall not contain more than forty (40) tons of sulphur per day for any two consecutive days during the period from May 1st to

October 1st of each year; and not exceeding eighty (80) tons per day for any two consecutive days during the remaining months of the year.' "

"Please take notice and act accordingly.

"This March 30, 1917.

"FRANK M. THOMPSON,
"Attorney-General of Tennessee.

"The State of Georgia has this day received a copy of the foregoing notice.

"This March 31, 1917.

"CLIFFORD WALKER,
"Attorney-General of Georgia.
"By M. C. Bennet, Asst. Atty.-Gen'l."

WHEREFORE, Intervenor now prays that the proposed decretal order and modification above be at once entered and become effective herein.

This March 31, 1917.

FRANK M. THOMPSON,
*Attorney-General of Tennessee.*

JOE V. WILLIAMS,
*Of Counsel.*

The State of Georgia hereby acknowledges and accepts due and legal notice, together with copies of the preceding application, and agrees that the application may be submitted at the date proposed.

This March 31st, 1917.

CLIFFORD WALKER,
*Attorney-General of Georgia.*

## MEMORANDUM SUPPORTING.

The petition of intervenor, in so far as it sought a modification, has never been acted on. It was filed on request of some seven hundred (700) residents and citizens of the territory contiguous to the smelting operations—and who petitioned the Governor of Tennessee to intervene. Said petition is respectfully referred to for its contents. Among other things submitted therein, was an extract from Dr. McGill's report, recommending:

> "That in ordinary conditions of the atmosphere a total sulphur content of the gases escaping of not exceeding forty (40) tons per day for two consecutive days during the period from May 1 to October 1 of each year be permitted, and not exceeding eighty (80) tons per day for two consecutive days during the remaining months of the year." (See p. 60 Inspector's Report.)

Manifestly, the Inspector intended to recommend an increase of nearly double the previously restricted output, and an average of two-day measurement instead of daily measurement, as theretofore, as is confirmed by his Report, pp. 63-4. The reasons for the Inspector's recommendations are pointed out pp. 17, 19, 63-4 of the Report.

*Note,* the Report of Dr. McGill, embodying his recommendations quoted from above, was not excepted to. It stands unchallenged. His recommendations seem altogether reasonable and fair and well supported by the facts.

Since last term, conditions have markedly changed—copper and sulphuric acid are in great and unusual demand. The country is entering on a stringent period, when there is urgent need of both.

Some equitable considerations moving Tennessee's intervention are summarized in the petition and supporting brief

filed last May, containing extracts from *Madison v. Copper Company,* 113 Tenn., 331, to which attention is respectfully invited.

Intervenor again submits, as shown in the petition above,—

> "The Company, to an extent at least, has therefore become a ward of Tennessee, and as such it is believed she is obligated to now ask permission to intervene for the protection, not only of the ward, but thousands of other citizens. And the important fact should not be overlooked that many thousands of Georgia citizens are equally dependent, with those of Tennessee, on the defendant Companies herein.
>
> "Responding to the petition of its citizens hereto appended, Tennessee asks to interpose whatever sovereign right she may have, and asks all consistent relief for an enterprise of such vast importance to her material growth and prosperity. And that the Company be permitted to utilize the *largest amount of ores possible,* without doing harm to the citizens of Georgia.
>
> "The State of Tennessee therefore respectfully, but earnestly, urges a modification of the restriction heretofore imposed conformably to the Inspector's report.
>
> "At the invitation of Georgia, in October, 1907, this Company spent over $700,000, and completed its acid plant in 1909. * * * * In this view, we submit Georgia is equitably estopped to now insist that the Company's acid plant, which it built on Georgia's invitation, should be partially paralyzed and its output reduced far below its capacity."

On page 59 of the Inspector's report, he gave as his "opinion that the restriction of the Company's operations during a whole season to an output far below its capacity, is *unnecessary.*" This was followed on page 60 by the recommendation raising the limitation previously imposed of 20 tons sulphur

content "during one day from April 10th to October 1st of each year", to "40 tons per day for two consecutive days during the period from May 1st to October 1st, * * * * and not exceeding eighty tons per day for two consecutive days during the remaining months of the year."

As the report and recommendations of the Inspector are clear, unchallenged and supported by the facts, it is very earnestly submitted that the modification proposed at the commencement hereof should be allowed.

A copy hereof has been duly lodged with the Honorable Attorney-General of Georgia.

Respectfully submitted,

FRANK M. THOMPSON,
*Attorney-General of Tennessee.*

JOE V. WILLIAMS,
*Of Counsel.*